No. 18265

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LARRY'S SANDWICHES, INC., a California corporation,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY CO., a California corporation,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLANT.

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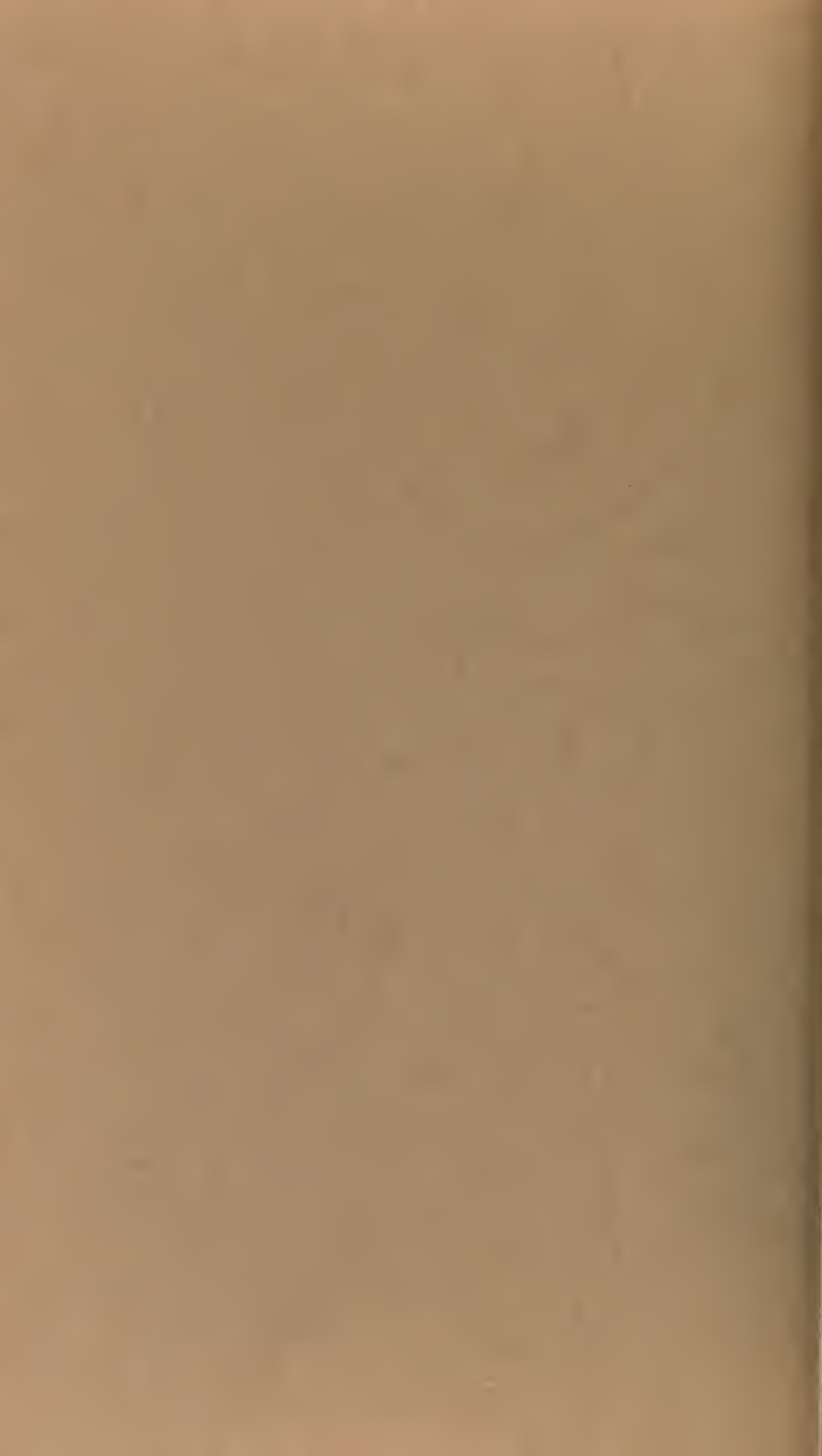

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No. 18265

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Larry's Sandwiches, Inc., a California corporation,

Appellant,

vs.

Pacific Electric Railway Co., a California corporation,

Appellee.

REPLY BRIEF OF APPELLANT.

Statement of the Case.

In its statement of the case Appellee characterizes the action as one founded on negligence and urges the primary issue in controversy on the appeal is the sufficiency of the evidence to support the District Court's finding that the Appellant failed to prove lack of due care on the part of Appellee. Appellant takes issue both with the characterization of the nature of the action and Appellee's statement as to the issues involved.

The action is founded upon the statutory duty of a common carrier to a shipper. That duty, in the absence of a showing of special circumstances, is that of an insurer. Only when these special circumstances are shown to exist does the carrier duty for care of goods

in transit shift to one of due care. As this Court has noted, in establishing liability there is a ". . . step by step progression through an accepted scheme of shifting burdens of proof . . ." (*Daido Line v. Thos. P. Gonzales Corp.*, 299 F. 2d 669, 671 (C. A. 9, 1962).) Appellant has specified five basic errors committed by the District Court. Four of these are based upon the proposition that the posture of the case in this step-by-step progression was such, both on the status of the proof and of the findings at the time of judgment, that Appellee's duty continued to be that of an insurer rather than one of due care. As a final specification of error Appellant urges that even if the test of due care is applicable the findings with respect thereto are so at variance with the clear weight of the evidence it is apparent a mistake has been made.[1]

Appellee's statement of the issues and of the nature of the action presume the final contention above noted is the only one before the Court for decision. Because the step-by-step progression through the accepted scheme of shifting burdens of proof must be followed to establish the nature of liability the specifications of error placing in issue the question of the posture of the case at the time of decision are the primary issues

[1]Formal statement of the questions presented and the specifications of error appear in the Opening Brief at pages 7-10. Statements in the Reply Brief as to errors specified and questions involved are intended as a reference thereto and should not be construed as modifying or changing Appellant's position as there stated.

on the appeal and must all be resolved before the issue which Appellee declares to be the critical issue is reached. Actually, if the Court finds merit in any of the first four specifications of error the final contention as to the weight of the evidence on the issue of due care is never reached. Thus, the issue which Appellee considers as the critical issue is in reality a contingent issue.

Because the determination of legal duty depends upon the true posture of the case at the time of decision and this posture in turn must be evaluated in terms of the step-by-step progression of proof it is necessary, properly to respond to the arguments of Appellee in the Reply Brief, to consider the several specifications of error in the order set forth in the Opening Brief rather than in the order adopted by Appellee in its reply.

ARGUMENT.

1. The District Court Has Predicated Its Judgment Upon an Erroneous Interpretation of Law.

1.1. Résumé of Appellant's Position.

By statute a common carrier is liable without proof of negligence for all damage to goods while in transit unless the carrier can make an affirmative showing that the damage was occasioned by an Act of God, the public enemy, public authority, an act of the shipper or the inherent vice or nature of the commodity.

> *Secretary of Agriculture v. United States,* 350 U. S. 162, 165, 100 L. Ed. 173, 76 S. Ct. 244 (1956).

The duty to establish the existence of an excepted cause changing the character of its legal duty rests with the carrier.

> *The Daido Line v. Thomas P. Gonzales Corp.,* 299 F. 2d 669 (C. A. 9, 1962).

Even in those situations in which injury in transit is attributable to one of the excepted causes the carrier must still act with due care in light of the special circumstances with which it is presented.

> *The Daido Line v. Thomas P. Gonzales Corp.,* 299 F. 2d 669 (C. A. 9, 1962);
>
> *Firpine Products Co. v. A.T. & S.F. Railway Co.,* 124 F. Supp. 906 (1954).

By the phraseology used in its findings [R. A. 43-44], and by its refusal to make findings on the question of the condition of the goods at the time of tender and upon the question of the presence or absence

of an "excepted cause" as a contributing factor to the injury after request therefor [R. A. 47, 108] the District Court made it clear that its concept of the law was that the carrier had at all times a duty of due care only and that it was the responsibility of Appellant to establish some specific negligent conduct as a condition precedent to a right of recovery.

1.2. Appellee Fails to Meet the Issue Presented on Appellant's First Specification of Error.

Appellee predicates its reply to the first specification of error upon two propositions:

(1) That all that is necessary for a successful defense of a "perishable commodity" case is a showing by the carrier that it complied with instructions, the provisions of the bill of lading and tariffs, and that it furnished, without negligence, reasonable protective service;

(2) That there is allegedly some evidence of record from which it might have been concluded that the loss was proximately caused by the shipper in not tendering to the carrier a properly frozen shipment. Both of these propositions beg the question in issue.

All that Appellee says by its argument is that the District Court applied a test of due care and that this test is the applicable test if all necessary conditions precedent in the step-by-step progression for determining carrier liability have been met. The test of due care is, however, a test applied in many situations. It is the motivation for the use of the test and not the fact of its use which is the significant circumstance in the determination of the issue here under consideration.

The District Court found that the sandwiches constituting the shipment were in fact of ". . . a perishable nature . . ." [R. A. 43.] It did not, however, make a finding that the damage was in fact caused by any inherent vice in the goods. No finding was made as to the condition of the goods at the time it was tendered to the carrier or that any act of the shipper contributed to the injury. These omissions must be accepted as intentional since the District Court denied Appellant's request that findings be made upon these issues after extensive points and authorities had been filed, a transcript of the record made available and oral argument had been presented. [R. A. 47-49, 51-60, 62-71, 73-93, 95-106, 108.] The refusal of the District Court to concern itself with whether or not the injuries were generated by some one or more of the "excepted causes"—the most important single element in the step-by-step progression for determining the character of the carrier liability—is a clear indication that it was not applying the applicable law to its determination of the case.

None of the cases cited by Appellee at pages 19 through 27 of its Brief is authority for the application of a test of due care to carrier responsibility for shipments in transit absent a precedent determination that the injury thereto was occasioned by an Act of God, the public enemy, public authority, the shipper or the inherent vice or nature of the commodity. In each of the cases so cited in which the test of negligence was applied the existence of an inherent vice or natural condition of the product was admitted to be or specifically found to be the immediate cause of the product deterioration. In the case of *Delphi Frosted Foods*

Corp. v. Illinois Central R. Co., 188 F. 2d 343 (C. A. 6, 1951), the only case cited involving frozen products, there is a discussion as to when the rule of negligence is to be applied. However, in that case the actual basis of decision was that the merchandise was not in good condition when tendered for transportation and that no damage occurred in transit.

Several of the cases cited by Appellee, including *The Daido Line v. Thomas P. Gonzales Corp.,* 299 F. 2d 669 decided by this Court in 1962, are authority for the proposition urged by Appellant that the carrier is burdened with proving that product involved suffered from an inherent defect as a condition precedent to a right to have its conduct with respect to the shipment measured by a standard of due care. Thus the refusal of the District Court here to consider and pass upon the existence or non-existence of an "excepted cause" of the loss is thus confirmed by Appellee's own authorities as a failure to apply the pertinent law.

2. The District Court Has Incorrectly Interpreted the Law as to Burden of Proof.

2.1. Résumé of Appellant's Position.

By its Findings of Fact the District Court imposed upon Appellant the burden of proving some specific act or omission constituting negligence on the part of Appellee or its connecting lines as a condition of Appellant's right to recover in the action. [R. A. 44.] There is a series of conditions precedent shifting burdens of proof which must be found to prevail before the burden imposed by the District Court falls lawfully upon the Appellant. These conditions precedent include the determination that the injury in fact occurred while the

goods was in transit, a determination that inherent vice, some act of the shipper or some other of the "excepted causes" has occasioned some injury to the goods while in transit, and that the carrier has made a *prima facie* showing that it has been free from negligence which would add to an injury otherwise beyond its power to control. In the present case the District Court has ignored all of the conditions precedent to the applicability of the rule as to burden of proof which it has applied, with the possible exception of the *prima facie* showing of the carrier. Since the District Court has refused to make findings as to the condition of the goods at the time of tender and as to the presence or absence of one of the "excepted causes" as a contributing factor to the damage sustained the posture of the case was such at the time of decision that it was improper under the applicable law to impose upon the Appellant the burden of proof fixed in Finding of Fact X.

> *The Daido Line v. Thomas P. Gonzales Corp.*, 299 F. 2d 669 (C. A. 9, 1962).

2.2. Appellee Presents No Arguments Sustaining the Position of the District Court as to the Burden of Proof Imposed Upon Appellant.

Appellee has combined in its reply its arguments with respect to Appellant's contentions 1 and 2. Therefore, the comments in the next preceding part of the Reply Brief also constitute a reply to the contentions of Appellee here under consideration.

The principal vice in the argument of Appellee appearing at pages 18 through 27 of its Brief is that it

assumes the District Court resolved in Appellee's favor all issues which would make applicable the rules for which Appellee contends when in fact the District Court did not do so. In all of the cases cited by Appellee in which the burden of proof here imposed by the District Court was sustained, the Court had made all of the necessary antecedent findings in the ". . . step-by-step progression through the accepted scheme of shifting burdens of proof . . ." so that the case was clearly in a proper posture at the time of decision for the application of the rules as to burden of proof applied. Here the District Court refused to make findings as to the condition of the goods at time of tender or as to whether or not an act of the shipper or inherent vice contributed to the loss sustained. Appellee's argument assumes, without justification, that these findings, if they had been made, would all have been resolved in Appellee's favor. What findings the District Court would have made had it undertaken to resolve these issues is, at this juncture, a matter simply of speculation. The fact that the District Court refused to find on these antecedent issues does show, however, that it was not applying the rules announced in the cases cited by Appellee (and by Appellant) in arriving at its decision as to the burden of proof which it felt Appellant was required to bear.

Appellee urges that where "perishable shipments" are involved and the shipper has packaged and loaded the goods the burden is on the shipper to show the condition

of his shipment. In the argument Appellee fails, as did the District Court, to take cognizance of the step-by-step progression necessary in a case of this type.

The shipper does have the burden of proving that the shipment was in good order when tendered to the carrier for transportation.

> *The Daido Line v. Thomas P. Gonzales Corp.*, 299 F. 2d 669 (1962);
>
> *Thompson v. James G. McGarrick Co.*, 205 F. 2d 897 (C. A. 9, 1953).

When the goods is packaged and loaded by the shipper this burden is not met by the presumption of a so-called "clear" bill of lading and proof must be presented the shipment was in fact in good order when received by the carrier.

See:

> *Armour Research Foundation v. Chicago R.I. & P. Co.* 297 F. 2d 176 (C. A. 7, 1961.)

However, this burden of proof as to good order at time of tender is a burden imposed on the shipper to establish that the injury in fact took place while the goods was in transit and not at some prior or later time. The rule is clear that once it is shown that the injury occurred while the shipment was in transit the carrier must show that the loss was attributable to an excepted peril.

> *Schnell v. The Steamship Vallescura*, 293 U. S. 296, 79 L. Ed. 373, 55 S. Ct. 194 (1934);
>
> *The Daido Line v. Thomas P. Gonzales Corp.*, 299 F. 2d 669 (C. A. 9, 1962).

The Supreme Court in the *Schnell* case stated the rule and the reason therefor as follows:

> "He [the carrier] is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. *In consequence, the law casts upon him the burden of the loss which he cannot explain, or explaining, bring within the exceptional case in which he is relieved from liability."* (p. 304; emphasis added.)

The record in this case shows without contradiction that it would be a physical impossibility for a frozen shipment in a properly operating car of the type used to arrive at destination in the condition which was actually found to exist. [Tr. 308, 399.] Since the District Court has refused to find either as to the condition of the goods at the time of tender or as to possibility of the intervention of an excepted peril the cause of the loss remains "unexplained". Thus on the state of the record at the time of decision and judgment conditions had not been established, under applicable law, imposing upon Appellant the burden which the District Court in fact used in its determination of the case.

3. The Findings of Fact Are so Incomplete and Indefinite That Clear Understanding of the Basis of Decision Is Impossible.

3.1. Résumé of Appellant's Position.

As has been noted, the District Court refused to make findings as to the actual condition of the shipment at the time of tender and as to whether or not some act of the shipper or an inherent vice in the goods was the generative cause of the damage suffered. These are pertinent issues as to which the District Court was obligated to make findings.

Fed. Rules Civ. Proc. 52(a);

Dale Benz, Inc. v. American Casualty Co., 303 F. 2d 80 (C. A. 9, 1962).

In the absence of findings on these pertinent issues it is impossible for the parties or for the Court of Appeals to ascertain with certainty what was the actual basis of the District Court's decision and judgment.

3.2. Appellee's Reply, in Effect, Concedes the Validity of Appellant's Contention That the Findings Are Deficient.

Appellee urges at page 28 of the Brief that the law does not require a carrier to prove the cause of damage in a ". . . perishable shipment case . . ." The argument misses the point. A "perishable shipment case" is simply a case in which it has been found that the commodity involved contains an inherent vice producing self destruction and that the injury is the result of the operation of this internal force. It is the absence of such a finding here which is the basis of Appellant's objection.

Appellee's basic liability as a carrier is that of an insurer so far as damage to goods in its custody for transportation is concerned.

> *Secretary of Agriculture v. United States,* 350 U. S. 162, 165, 100 L. Ed. 173, 76 S. Ct. 244 (1956).

To avoid that liability it was necessary for Appellee to establish two things: (1) that some act of Appellant or some inherent vice in the goods actually caused damage to the goods while it was in course of transit, and (2) that Appellee did not aggravate the injury by any lack of due care on its part.

> *The Daido Line v. Thomas P. Gonzales Corp.,* 299 F. 2d 669 (C. A. 9, 1962).

The argument of Appellee here under consideration is related to its duty in order to make a *prima facie* showing under the second circumstance above. The deficiency in findings as to which Appellant complains relates to the first. Obviously, there must first be a finding that an "excepted peril" caused injury before an issue can arise as to the character of Appellee's conduct in the face of such peril.

Appellee argues that the District Court made a finding that the shipment was tendered in "apparent good order" and that such finding is the only one which could have been made on the record before it. The District Court did not so find. Its finding in this respect simply was that the receipt issued by Appellee at the time the goods was received stated that the shipment was in "apparent good order" when received. A considerable portion of the testimony at the trial was devoted to the subject of the actual condition of the

goods at the time of tender to Appellee. A finding of some kind as to the proof with respect to the condition of the goods at time of tender was necessary. Appellant believes the state of the record is such that the District Court was compelled to find either that the shipment was in good order or that it was not. At the very least the District Court was required to find that there was insufficient evidence to establish condition at the time of tender. Had such finding been made this Court and the parties would at least know that the District Court had predicated its judgment upon a determination that an injury *while the shipment was in transit* had not been proved. The difficulty is that there is a complete absence of any finding on this fact issue upon which every other fact issue in the case depends to a greater or lesser degree.

As the briefs of both parties show, on each question which is raised and in each argument which is presented with respect thereto it has been necessary to speculate as to what was in fact the position of the District Court on ultimate facts vital to a proper determination of the controversy. In such a situation the Court of Appeals lacks the information required for an intelligent review of the lower court's judgment.

National Lead Co. v. Western Lead Products Co., 291 F. 2d 447, 451 (C. A. 9, 1961);

Irish v. United States, 225 F. 2d 3 (C. A. 9, 1955).

4. The Finding That the Sandwiches Were "Perishable" Is Clearly Erroneous.

4.1. Résumé of Appellant's Position.

The only finding made by the District Court which could possibly be construed as related to the subject of an "excepted peril" is the statement in Finding of Fact V that "Said sandwiches were in fact of a perishable nature." [R. A. 43.] In the context of the issues of the present litigation the statement is ambiguous. All products are "perishable" in the sense that they can be destroyed by some outside force. Some articles are also "perishable" in the sense that they have an inherent power of partial or total self-destruction while in transit even though every reasonable precaution against such destruction is taken by the carrier.

A carrier is liable without negligence for destruction of goods in its custody by the intervention of some exterior force.

> *Secretary of Agriculture v. United States,* 350 U. S. 162, 100 L. Ed. 173, 76 S. Ct. 244 (1956).

There is no responsibility upon the carrier for a loss in transit attributable entirely to the operations of a self-destructive force inherent in the character of the article itself.

> *The Daido Line v. Thomas P. Gonzales Corp.,* 299 F. 2d 669 (C. A. 9, 1962).

A carrier is, however, liable if the self-destructive processes have been accelerated beyond their normal rate during transit because of some lack of due care on the carrier's part.

> *The Daido Line v. Thomas P. Gonzales Corp.,* 299 F. 2d 669 (C. A. 9, 1962).

The commodity shipped consisted of "frozen sandwiches". The vehicle of transportation was a mechanically refrigerated car. Frozen sandwiches are inert and have no inherent vice or other natural power of self destruction so long as they remain "frozen sandwiches". The function of a mechanically refrigerated car is to prevent the destructive force of heat from an outside source from reaching and damaging the product while in transit. Measurable deterioration of frozen sandwiches in a properly operating refrigerator car during the transit times involved in the present case is shown by the uncontradicted evidence of both parties to be a physical impossibility. A finding that the sandwiches in their frozen state are a "perishable" in the legal sense of that term pertinent to the present litigation is, therefore, clearly erroneous.

4.2. Appellee Has Failed to Demonstrate That Frozen Sandwiches Are Subject to Any Inherent Vice or Other Natural Condition Which Could Cause the Damage Sustained.

As has been noted in the Opening Brief, expert testimony as to the physical characteristics of the product and the rail car involved was presented by both parties. (Op. Br. pp. 27-29.) Appellee's own expert witness explained that there is a difference between what he described as "fresh perishables" and "frozen commodities". [Tr. 399.] Fresh perishables have a "heat of respiration" which may be as much as several times the heat which would leak through the wall of the storage structure. [Tr. 399-400.] Fresh food products are, therefore, subject to a self-generated heat, producing decay which is at work at all times. It is this self-

generated heat which is the "inherent vice" bringing food products within the rule of "excepted perils" for purpose of determining carrier liability.

The products here involved were not fresh but frozen. The uncontradicted testimony of the expert witnesses produced by both parties establishes that frozen sandwiches are inert so far as heat generation is concerned. [Tr. 399, 208.] Held below their freezing temperature sandwiches will keep without deterioration for as much as a year or more. [Tr. 209.] The mechanically refrigerated car provided for transportation of the shipment involved had the design capability of holding the sandwiches in a frozen condition. [Tr. 441-445, 521-523.] The only source of heat capable of causing decay to a frozen product in such a car would be that introduced through the wall or car structure. [Tr. 399.] In short, on the evidence of Appellee's own expert, frozen sandwiches are not the subject of any "inherent vice or natural condition" of such character as to bring them within the scope of the "excepted perils" rules.

The only evidence to which Appellee makes reference in support of the District Court's finding that the sandwiches were "perishable" is the testimony given by a claims inspector as to an examination made by him of the damaged merchandise the day following the first discovery of the damage and after a part of the load had been removed and replaced. [Tr. 157, 327-330.] The testimony to which Appellee refers is to the effect that cases of sandwiches at 64° Farenheit were found completely surrounded by cases of sandwiches which were frozen solid in an area of the car where the load had presumably not been disturbed. [Tr. 356.] More

will be said in the next part of the Reply Brief as to the incredibility of this evidence. It is sufficient here to note that the refrigeration experts called by both parties were in agreement that what the witness Hailey said he found as to the temperatures of adjacent packages is a physical impossibility under natural laws of heat transfer. [Tr. 417, 534.] However, assuming the testimony of the witness Hailey could be believed, it would not establish that frozen sandwiches are the subject of any inherent vice capable of their self-destruction. The evidence does not, therefore, provide support for the finding of the District Court here under consideration.

Appellee cites *Delphi Frosted Foods v. Illinois Central R. Co.,* 89 F. Supp. 55, aff. (6 Cir. 1951), 188 F. 2d 343, apparently for the proposition that frozen foods are subject to an inherent vice or natural condition as a matter of law. The question of "inherent vice" is one of fact in each case and not a matter of law. Actually, the *Delphi* case does not consider the question here raised. The basis of decision in the cited case was that the shipment was not in fact frozen when tendered for transportation. Further, the refrigeration provided in that case was the traditional ice and salt. Mr. McKee, Appellee's expert in the present case, testified ice and salt are not capable of creating temperatures low enough to maintain the frozen condition of a commodity during normal transit conditions. [Tr. 376-377.] The car used in this case was designed to have such a capability. Thus, in the *Delphi* case temperature rise of the product was apparently an anticipated circumstance of the transportation. In this

case it was not a circumstance to be considered on Appellee's premise as to the facilities it provided.

The fact that Appellee's tariff Rules 130 and 135 were received in evidence without objection cannot be taken as proof that the shipment was subject to an "inherent vice". At all stages in the proceeding there has been an issue as to whether the damage was caused in act by an inherent vice or defect in the product shipped [R A. 26.] The rules to which Appellee makes reference simply declare in tariff form the statutory duty of the Appellee existing as to products shown to have some inherent vice or natural condition producing self-destruction during transit. The rules have some pertinence to the case if Appellee could establish by other evidence the product had an inherent tendency to decay in the transportation environment Appellee agreed to provide. The tariff rules could not, however, establish the physical characteristics of the frozen sandwiches.

5. The Findings of the District Court That Appellee Did Nothing to Cause Damage to the Shipment and That It Acted in Compliance With the Bill of Lading and Applicable Tariffs Are Clearly Erroneous.

5.1. Résumé of Appellant's Position.

It is Appellant's position that even though all other issues on appeal were to be resolved in favor of the Appellee reversal is here required because the findings as to the cause of damage are clearly erroneous within the meaning of Federal Rules of Civil Procedure, Rule 52(a) as interpreted in *United States v. U. S. Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1947). The evidence is uncontradicted that the Appellant pre-

pared and loaded the product for transportation in accordance with accepted industry practices. Other loads had been similarly handled without incident. Those who participated in the loading process gave uncontradicted evidence establishing the shipment was frozen and otherwise in good condition when tendered to Appellee. In its frozen condition in a properly operated car the shipment was inert and incapable of self-destruction. Heat was necessary to produce the injury involved. The only possible source of such heat was improper leakage through the car structure. Such leakage could occur only if the car did not function properly. Physical evidence of condition of the shipment at destination and the history of recorded temperatures in transit are consistent with a malfunction in the air circulation system. Without air circulation heat leakage would be inevitable. Under the circumstances the injury must have resulted from a failure of Appellee's car to function as designed and Appellee has, therefore, been the actual cause of the injury involved.

5.2. The Evidence to Which Appellee Makes Reference in the Brief Does Not Support the Challenged Findings of the District Court.

To support the Findings that it was not the cause of the injury involved Appellee relies almost entirely upon evidence which it considers to be indicative that the shipment was not frozen when it was first tendered for transportation.

The evidence to which Appellee first directs attention is the record of thermometer readings taken while the car was in transit to Chicago. These readings were +7°, +5°, +6°, +2°, +6°, +8°. [Ex. A.] Appel-

lee's own expert conceded that this temperature pattern was not what would be expected to result in a car at a setting of −5° operating normally with a frozen load. [Tr. 459-462.] Temperatures ranging to +64° were found upon arrival. Appellee's expert inferred that the temperature pattern of car readings might be attributable to warm product. [Tr. 422.] However figures presented by the same witness indicate the car had the capacity to exert a cooling influence on the entire load even under such circumstances. [Tr. 443-445.] The record shows without question that on the return trip when it is known that there was product in the car at 64° and a properly operating car the temperature pattern of the thermometer readings shows a steady decline and much lower readings than those shown on the eastbound trip. [Ex. A.] The thermometer readings reflect only air temperature immediately below the freezer coils. [Tr. 525-526.] Those recorded while the car was in transit to Chicago are consistent with a malfunctioning of the air circulation system and a warming load but not consistent with a properly operating system and a cooling load. [Tr. 525-526.] All factors considered, it is apparent the temperatures in the car are not necessarily reflected by the gauge readings and that the readings are more indicative of malfunction than of proper function of the car.

Appellee makes some point in the Reply Brief that the merchandise was moved by truck in unrefrigerated vans the distance of approximately one mile and that "shrouds" were not placed over the car doors during loading. (Reply Br. p. 9.) Reference is made to certain experiments conducted by the Appellee's expert as

to the time for two sandwiches, in the customary paper container and foil, to thaw. Appellee argues, although its expert did not so testify, that similar conditions could be expected in the movement of the cartons in loading as were found to exist as to separate packages in the experiment.

If Appellee's evidence is carefully examined it will be noted that nowhere has Appellee's expert made any claim that the practices criticized would in fact destroy the frozen condition of the shipment. On the other hand, there is expert testimony which is positive to the effect that the method of handling used would not produce a change of temperature on the cartons which would be significant. [Tr. 517-519.] Maximum possible change would be 3° and that would involve only the cartons on the extreme outside of the truck as loaded.

Appellee cites the lack of specific written records as to product temperature and speculates that the merchandise might have been loaded into the car without sufficient freezer storage. (Reply Br. p. 10.] This conclusion is apparently predicated upon the fact that the witness Hailey who examined the car in Chicago could not recall observing chalk marks on the cartons. At the time Hailey saw the car it had been in transit for a week. He had no reason to know of the markings or to recognize their significance if he saw them. It is rank speculation to postulate that the shipment was not frozen on the basis of such evidence. Especially is this true because there was direct evidence from every person who participated in the actual loading process that only frozen cartons were placed in the car. [Tr. 40-41, 232, 241-242, 247, 248, 251.]

To support the challenged findings of the District Court Appellee places primary reliance upon the evidence adduced from the witness Hailey who made an inspection of some of the cartons in the car the day following its arrival at Chicago. (Reply Br. pp. 10-11.) Great stress is placed upon the testimony of this witness that he found cartons in the center of the load ranging from 44° to 64° and that the temperatures of cartons on the outside of the load were below freezing. [Tr. 340-341.] From this evidence Appellee postulates that the car must have been loaded warm and been cooled while in transit.

Some comment has already been made as to the credibility of the witness Hailey. His testimony is that he found cartons at 64° immediately surrounded on all sides by cartons, the temperature of which was below freezing. Admittedly, these cartons had been in contact with one another for nearly a week. What Mr. Hailey has said is that he took a paper carton containing sandwiches from the center of what amounts to a solid block of ice in which it had been embedded for nearly a week and found the contents unaffected by the chilling effect of the surrounding material. Although the experts both agreed this could not be, expert testimony to establish the fallacy of such a statement is certainly not needed. This Court is not required to accept the credibility of a witness as to testimony in direct conflict with the laws of nature.

In its discussion of the evidence of conditions found to exist at destination Appellee relies entirely upon the evidence of Mr. Hailey. The Appellee disregards entirely the testimony of the witness Pinski who was the man who actually opened the car upon arrival and made

the initial inspection. [Tr. 143-198.] Mr. Pinski was not an interested witness as was Mr. Hailey. Mr. Pinski's testimony as to where in the car the high temperatures were encountered contradicts that of Mr. Hailey in almost every respect. [Tr. 155, 159.] Cartons taken from the top two layers of the load reflected temperatures of 48° to 56°. [Tr. 159, Ex. 6.]

All of the evidence to which Appellee makes reference relates to conditions found to exist after the arrival of the shipment at destination. At that time the shipment had been in Appellee's possession for nearly a week. There is evidence, as above noted, that the car used had the capacity, if operating properly, to exert a considerable cooling effect upon the contents. The evidence is uncontradicted that on its return trip to Los Angeles the car was capable of reducing the temperature of a considerable number of the cartons from 64° to a completely frozen condition. [Tr. 49, 502.] The temperatures at this later date varied from 2° to a maximum of 18°. [Tr. 502.] The product involved is basically a cooked article when made. There was no necessity, in making a sandwhich, for its temperature to rise above the ambient temperature. Implicit in Appellee's argument is the proposition that the car, properly operating, could not reduce the temperature of cartons presumably placed in the car at room temperature below 64° on the six days of the trip east but that the same car could then take the temperature of the load down from 64° to a point below freezing in the same time on the return trip. The impossibility of Appellee's contention in face of natural laws is specifically shown in the record by the testimony of Appellant's expert whose studies showed that if as much as 40% of

the load had been at 60° when loaded all or substantially all of the load would have been frozen upon arrival had the car been operating properly. [Tr. 530.]

The Court's attention is directed once again to the fact that the District Court made no finding on the condition of the goods at the time of tender to the Appellee. All of the evidence to which Appellee has made reference and which is here under consideration is germane to that issue and that issue only. Implicit in the finding of the District Court (on Appellee's theory of the law) is a prior determination that the shipment was received in good order because it is only as to those cases in which the injury takes place while the shipment is in transit that it is necessary to make findings as to the due care of the carrier. Thus, in arguing the true basis of decision was that the shipment was not in good order when tendered, Appellee defeats its own contentions as to the status of the case at the time it was submitted for decision.

6. Conclusion.

The assumptions and speculations which are so important a part of the Appellee's arguments themselves serve to demonstrate that the District Court has erred in a number of important respects. Vital and important findings have been omitted. Findings which have been made are obviously predicated upon a misconception of the applicable law by the District Court. Its judgment is clearly erroneous and should be reversed.

Respectfully submitted,

Theodore W. Russell,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

THEODORE W. RUSSELL